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ABSTRACT

Recently competition policy has become an important trade policy issue, since many policy makers now see competition policy as an important instrument to secure "market access" to foreign markets. This paper analyzes this issue both from a theoretical point of view and from the review of the recent development of the Japanese competition policy. While voluntary trade cartels have a strongly negative international spillover, export cartels or international cartels do not constrain "market access," and export restraints were often used to ameliorate trade frictions. Moreover, domestic cartels often have a positive international spillover on the export from foreign countries. Thus, the recent focus on competition policy from "market access" concern is misleading. The Japanese government has substantially strengthened its competition policy in the 1990s, especially in terms of drastic reduction of cartels exempted from the application of Antimonopoly Law and in strengthening its enforcement against cartels. While these changes of competition policy would be highly beneficial to the Japanese economy, it is not clear whether such policy changes could have a substantial impact on "market access."

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Introduction

Competition policy has emerged as one of the high priority policy issues in East Asian economies. Japan has strengthened its competition policy substantially in 1990s, significantly responding to the US demand in the Structural Impediments Talk from 1989 to 1990, but also within the overall context of the regulatory reform. Both Korea and Taiwan have also substantially strengthened competition policy in recent years[1]. Competition policy has emerged as an important policy issue in regional and multilateral context too. The Action Agenda adopted in the APEC Osaka meeting of November 1995 calls for the establishment of appropriate cooperation arrangements of competition policy authorities among APEC economies[2]. The working party on trade and competition policy was recently established in the WTO, which may lead to the inclusion of competition policy obligation in the WTO treaty.

These developments reflect the increasing perception of policy makers that private anticompetitive behaviors may continue to constrain "market access", even though official barriers by border measures have come down[3]. In fact the most important driving force for including competition policy in the agenda of the next round of trade negotiation under WTO seems to be "market access" concerns. However, there has not been much economic analysis of how private anticompetitive behaviors can serve as trade barriers[4]. In fact there looks to be much confusions as well as unwarranted views in this area.

This paper addresses how competition policy is and is not important

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[1] In Korea KFTC(Korean Fair Trade Commission) became an independent administrative agency in 1994. Taiwan enacted the Fair Trade Law in 1991 and established the enforcing agency (the Fair Trade Commission) in 1993.

[2] It envisages, among others, strengthening cooperation among the competition policy authorities of APEC economies with regard to information exchange, notification and consultation, and developing non-binding principles on competition policy and/or laws in APEC.

[3] See, for an example, the Economic Report of the President of the USA in 1994, as well as Report of the Group of Experts of the European Commission(1995).

[4] Exceptions are Bliss(1996) and Levinsohn(1996). See also Scherer(1994).

for international trade. In the first section we conduct a simple economic analysis of international spillovers of anticompetitive behaviors. In the second section we briefly review the recent development of the Japanese competition policy, with an emphasis upon its international aspect. In the third section we evaluate priorities for international cooperation in competition policy based on the assessment of the importance of international spillovers of competition policy. Section 4 concludes.

I International Spillovers of Anticompetitive behaviors

There has been increasing international concerns over the possibility that anticompetitive behaviors of private enterprises of trading partners harm trading opportunities. This section assesses how trade cartel, domestic cartel, merger and vertical restraints can affect foreign countries through international trade. We do not discuss monopolization, including predatory pricing[5].

1 Trade Cartel

Trade cartels restrain international transactions[6]. They include export cartel, import cartel and international agreement for dividing-up national markets. Restriction of international trade reduces global supply and welfare, and simultaneously harms the interests of trading partners.

This point can be illustrated by using Figure 1 in the context of export cartel and quantity competition. We assume here that the national markets are segmented. In Figure 1, q represents the export of a home country and q^* for the supply of the import-competing industry of a foreign country. The export cartel by the home firms shifts the reaction curve of the home

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[5] Mergers and vertical restrains are, however, major means of monopolization. There exist extensive theoretical and empirical literature on dumping, which generally suggests that predatory pricing is a rarely used business strategy in spite of many accusations(See Nagaoka(1995) for the review of the recent literature).

[6] When a trade cartel is used as a means to enhance investment for trade promotion, it can lead to the expansion of intrnational trade. Here we focus only on "naked" trade cartel, the objective of which is to improve terms of trade by limiting trade.

country inward, so that the outputs of the foreign firms expand ($dq^* > 0$) and the market price P goes up ($dP > 0$)[7]. The welfare change of the foreign country is given by

$$(1)\quad dW^* = (P - c^*)dq^* + (q^* - q^*_H)dP$$

where W^* is welfare of the foreign country, c^* is the cost of production of the foreign industry, and q^*_H is the consumption of the foreign country. Because of such cartel, the foreign country, on the one hand, loses due to the terms of trade deterioration since it is an importing country($q^* - q^*_H < 0$), but on the other it gains due to the rent shifting effect for the foreign industry($(P - c^*)dq^* > 0$).

The net effect of the cartel for the foreign country, however, is always negative as long as the export cartel is voluntary, since the exporters engage in the cartel only if it is profitable for them, while the global welfare declines due to the cartel unless the marginal cost of the exporters is substantially above that of the foreign industry[8]. That is,

$$(2)\quad dW^* = d(W^* + \Pi) - d\Pi < d(W^* + \Pi) < 0,$$

where Π is the profit of the exporters of the home country and $W^* + \Pi$ is the sum of consumer surplus and producer surplus for the market equilibrium in the foreign market. Thus, voluntary export cartel is clearly a beggar-your-neighbor policy, since the home country where such cartel originates always gains, and the foreign country loses[9]. There exists a negative international spillover of non-enforcement of competition policy against export cartels. The identical conclusions apply to import cartels.

(Figure 1)

When export restraint is a part of international agreement among firms

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[7] Whether the price goes up or not depends upon the slope of the reaction curve of the foreing country. However, if it is foreseen that price will go down as a result of export cartel, the home firms will not engage in such a cartel.

[8] $d(W^* + \Pi) = (P - c^*)dq^* + (P - c)dq = (P - c)(dq + dq^*) + (c - c^*)dq^*$.

[9] Involunatry cartel can reduce the profit of its members due to the expansion of the supply of outsiders(see Salant, Switzer and Reynolds (1983)). Such outcome is very likely in the case where competition is Cournot, strategic substitute holds, and outsiders have a significant market share.

for allocating markets among themselves, all countries can lose. This is most clear in the following symmetric case, where home and foreign countries are of the same size, and each country has one firm with common production cost. In this case the firms can achieve the monopoly outcome by completely refraining export to the competitor's market. The welfare of both countries decline due to constrained supply, while both firms gain.

It is important to note that abolition of export cartels does not necessarily improve welfare, given the presence of contingent protection, to the extent that they are used to prevent the use of contingent protection. In particular, antidumping measure can result in a stronger restriction of trade, since duties ordered are often prohibitively high. As shown by the recent ITC report (1995), antidumping measure often results in a very large reduction of export or its complete abolition, so that its trade-restraining effect can be much larger than the monopolistic reduction of export[10]. Thus, reform of antidumping measure is necessary to ensure that the international restriction of export cartels leads to welfare gain.

2 Domestic cartel and merger

(1)Domestic sales cartel and production cartel

When domestic and foreign markets are segmented, the domestic firms can collude to raise their sales price in the domestic market by restricting only their sales in the domestic market. Since the prices of the domestic market is not linked with that of the foreign market, the domestic sales cartel does not affect the equilibrium in the foreign market if the marginal cost of production is constant. Due to such cartel, the foreign country does not suffer the reduction of import supply, while it can expand its export. Thus, the foreign country's welfare definitely improves due to the sales cartel in the domestic country's market.

When domestic and foreign markets are integrated, the domestic firms have to reduce sales in both domestic and export market in order to raise their sales prices. Thus, the effect of such cartel can be analyzed as the

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[10]The fact that the export industry typically dislikes antidumping measure imposed upon itself, also, suggests that export restriction imposed by antidumping measure is stronger than the profit maximizing restraint of trade.

effect of production cartel by the domestic firms. Now we can interpret Figure 1 as representing the global market. When the home country is an importing country and the foreign country is an exporting country($q^* - q^*_H > 0$), it is clear that the foreign country gains from the cartel by the firms in the home country. It gains both from the terms of trade improvement and from the rent-shifting effect for its firms, as is clear from equation (1).

On the other hand, when the home country is an exporting country and the foreign country is an importing country($q^* - q^*_H < 0$), the cartel by the home firms worsens the terms of trade of the foreign country, while the rent-shifting effect is positive for the foreign country, as in the case of export cartel. The welfare of the foreign country is likely to decline especially when its firms are not efficient (high c^*)[11].

The above analysis shows that the international spillover of domestic cartel tends to be positive. It can become negative, only when the foreign country is a net importing country and its import price rises substantially. On the other hand, domestic cartel harms the home country and international trade tends to amplify this effect when markets are segmented or it is an importing country, since it invites the deterioration of its terms of trade.

In spite of this clear result, policy makers frequently hold a view that cartel abroad harms the interest of home industry, since cartel profit is used to promote the cartel's export. According to this "profit sanctuary" story, high profit gained from domestic cartel is used to subsidize export or such a cartel forces domestic consumers to cross-subsidize export. Such view cannot be supported by economic analysis. The domestic industry is not going to spend profit gained in the home market for export promotion, unless such act is profitable by itself. Profit in the domestic market may provide means for artificial export promotion but not its motivation, so that a firm does not cross-subsidize consumers in one market by using profit made in another market[12].

[11] High production cost of the foreign firm causes a larger dependency on import as well as low profit margin of the foreing firm.

[12] Cross-subidization may become relevant in the regulated industry, where the regulator allows the regulated firm to set its price based upon its cost. In such

In the case of import protection, protection may promote export not by providing the means for cross-subsidization but by strengthening its competitiveness(Krugman(1984)). Import protection shifts the global expenditure pattern in favor of the home industry, encouraging its cost-reduction and learning while discouraging those of foreign industry. However, in the case of cartel, the exact opposite is the case. This is because, contrary to the case of import protection, a cartel shifts market away from the home industry to the foreign industry(See Figure 1). Consequently, the speed of cost-reduction of the home industry becomes slower while that of the foreign industry accelerates. Thus, domestic cartel does not substitute import protection in this regard at all and it in fact tends to reduce competitiveness of the home industry.

(2)**Merger**

Merger among home firms have similar spillover effects on the foreign country as the combination of domestic and trade cartels, if we ignore the potential efficiency effect of a merger for a while. This is because the consolidated firm will have more market power in both domestic and export markets, and restricts sales in each market. Thus, merger antipromotes export and promotes import, if its efficiency effect is small, as pointed out by Bliss(1996). As for welfare, the merger in the import-competing industry of the home country increases the welfare of the foreign country. The merger in the export industry of the home country worsens the terms of trade of the foreign country, so that it can harm its welfare when the foreign competing firms have high costs.

Competition policy authority typically will not allow a merger between firms, if it creates a significant market power in the home market. Even when efficiency defense for a merger is considered as in the case of the USA, a merger which will significantly increase the market power will be approved only if such a merger is expected to have a strong efficiency effect, which can dominate the price-raising effect. Thus, competition policy regulation of mergers tends to reduce (and can reverse) negative as well

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an industry the regulated firm in fact has an incentive to use the assets of the regulated business to expand its business in the unregulated market, since the private cost of such activity is zero.

as positive international spillover of mergers.

(3) Downstream and upstream effects of cartel and merger

Domestic cartels in business service sectors such as international transportation or international communication, which support international trade, have a definitely constraining effect upon international trade, since they raise the cost of international trade. Similarly, cartels by distributors in a specific industry will raise the consumer price of that industry, which in turn will reduce demands both for domestic and foreign goods in that sector. The effect of these cartels upon the foreign country is just like tariff on its export (or export duty on its imported goods). The foreign downstream industry suffers from the terms of trade deterioration and the decline of the amount of trade[13]. Thus, even if the effect of such a cartel upon the foreign industry in horizontal relationship with the domestic industry is positive, its international effect may be negative if its effect upon the downstream foreign industry is significantly negative. Similarly, the domestic cartel can have a negative international effect if its negative effect upon the foreign upstream industry, such as foreign component supplying industry, is large.

3 Vertical restraints

Vertical practices may affect international trade both by constraining inter-brand competition and by reducing intra-brand competition. We discuss them in turn.

(1) Inter-brand competition

Vertical restraints by incumbent domestic firms may constrain entry and growth by both foreign and domestic suppliers, when they are used to increase the cost of entry and doing business in the market[14]. Such business practices as exclusive dealing, vertical integration and refusal to deal

[13] The home country can also lose since the monopoly transportation, communication, or distribution firm raises its price beyond the level of the optimal tariff, ignoring its effect upon domestic consumers and producers.

[14] Vertical restraints may be used strategically for raising the rival's cost, in particular for exclusionary reasons(See Ordover and Saloner(1989), Ordover, Saloner and Salop(1990), and Tirole(1990)).

may be used for such objectives. The foreign firm will suffer from the sales loss due to such anticompetitive practices by incumbent domestic firm. However, vertical restraints by incumbent firms are also used to increase the efficiency of the supply[15]. It is important to note that vertical restraints by incumbent firms always reduces "market access" by a new entrant, irrespective of whether such practices reduce cost of supply by incumbent firms or they increase the cost of supply by new entrants. When the main effect of vertical restraints is to reduce the cost of supply by the incumbent firm, it tends to increase global welfare, even if the foreign firm suffers from competitive loss.

Thus, it is important to identify the anticompetitive vertical restraints from efficient ones. Market structure plays a critical role in that regard. In particular, the following three conditions have to be simultaneously present for the strategy of raising rival's cost to become a credible profit-maximizing strategy, as pointed out by Ordover and Saloner (1989) among others. First, the foreclosing firm has to have significant market power. Like predatory pricing, engaging in exclusionary practices is costly for the foreclosing firm. Thus, in order for the payoff of exclusion strategy to be positive and to exceed that of entry accommodation strategy, the firm has to have a profitable market to be protected from competition. Second, the foreclosing firm has to be willing to pay more than the foreclosed firm in foreclosing the market. Unless, the foreclosure is blocked or undone by the targeted firm. Thirdly, the supply of the foreclosed resource has to be inelastic. Competitive output markets makes the first two conditions unlikely to hold, while competitive input markets makes the third condition unlikely to hold.

(2) Intra-brand Competition

Vertical restraints such as territorial restraints may be used to price discriminate national markets. Although output effect of price

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[15] Vertical restraints can be efficiency increasing on various grounds (See Katz (1989)). They facilitate smooth information flow across related parties and enable its efficient use. They also encourage investment by controlling ex-post opportunism. They help internalizing vertical or horizontal externalities such as double marginalizaion and free riding upon investment in reputation.

discrimination can be positive, especially if such price discrimination is necessary for inducing a firm to serve each national market, international price-difference per se is welfare-reducing. The welfare cost due to international price difference becomes larger as such difference become larger. Therefore, competition policy measures which prevent the emergence of a high degree of international price difference can be welfare-improving[16]. Such measures include the regulation of the strength of territorial restrictions imposed on distributors by a producer and the prohibition of a firm from interfering with parallel imports or reverse-imports.

The welfare impact of price discrimination upon a foreign country depends upon whether the firm sets higher price abroad than at home, which in turn depends upon the consumers' willingness to pay and the degree of competition abroad relative to those at home. If a firm discriminates in favor of the consumers of the foreign country, the foreign country tends to gain from such business practices. The benefit of lower price to its consumers tends to dominate the loss of the competing firm. Thus, international price discrimination can have a positive international spillover.

III Recent Development of Japanese Competition Policy

1 Trade Cartel and International Division of Markets

Trade cartels, which are approved by the Ministry of International Trade and Industry under the Export and Import Transaction Law[17], have been

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[16] However, there may be good cases for price discrimination for goods embodying new techonology and among markets with significant differences of income. In the former case price discrimination may be useful for expanding the areas for technology application and the profit gained from price discrimination tends to encourage R&D (see Hausman and Mackie-Mason (1988)). In the latter case the prohibition of price discrimination has a significant danger of making the firm to choose abandoning the markets with lower incomes.

[17] The law was enacted in 1952. Its objectives are to prevent unfair export transactions,and to establish orderly export and import transactions. Unfair export transactions include those infringing intellectual property rights in importing countries, and false indication of the rules of origin.

exempted from the application of the Antimonopoly Law of Japan. Export cartels have accounted for more than half of the exempted cartels in terms of numbers(See figure 2 and Table 1). The number of trade cartels, however, has been substantially reduced over time. As of the March of 1997, the number of trade cartels were 5, out of which 4 were export cartels[18]. The significant reduction of trade cartels has reflected, first, the general reduction of the scope of exempted cartels. The Japanese government has reduced the scope of exemptions since the latter half of the 1980s within the context of regulatory reform. Regulatory reform has gained the new momentum recently. In 1995 the cabinet decision was reached, so that exempted cartels be abolished in principle by the end of fiscal year 1998. Accordingly, the exemptions for import cartel, the association of small traders and domestic cartel for export restriction were abolished in 1998.

(Figure 2)

Second, the recent reduction of trade cartels also reflect the prohibition and phase-out of voluntary export restraints, as agreed in the Uruguay Round. Export cartel was an important means of implementing VERs and MFAs (Multi-Fiber-Agreements). According to the JFTC (Japanese Fair Trade Commission) report (1991), the prevention of trade frictions was the main objective of the two thirds of the export cartels, i.e. 20 out of 30 cartels, in 1991[19].

Trade cartels, which are not approved by the government, are violations of Antimonopoly Law of Japan, even if they do not directly affect home market. Recently JFTC caught such a case: the cartel coordinated by an industrial cooperative to fix domestic wholesale price as well as the export price of its member's products[20]. Moreover, participation in international cartels per se is also prohibited by the Antimonopoly Law[21].

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[18] 4 export cartels include textile(quantity) for certain destinations, ceramics (design), and pearl(quality). One import cartel is silk products import from China.

[19] Counterveiling the import monoploly was another objective (7 cases in 30).

[20] In 1994 the national mosaic tile industrial cooperative was ordered by the JFTC to stop the practise of price fixing in both markets and was levied the surcharge.

[21] One major case uncovered by the JFTC is the international cartel between Japanese

(Table 1)

2 Prohibition of cartels and regulation of mergers

(1) Prohibition of cartels

The Japanese government has also strengthened the enforcement of Antimonopoly Law against cartels by increasing significantly the administrative surcharge on firms engaged in cartels, by more actively invoking the procedure for criminal prosecution and by strengthening its investigative capacity. Administrative surcharge was increased significantly in 1991. As a result, the surcharge on a manufacturing firm participating in a cartel was raised from 2% of its sales to 6% of its sales[22]. The average annual surcharge levied from 1991 FY to 1995 FY after the increase was 4.5 times as much as that before the increase, if we exclude the year 1990 FY in which cement industry was levied a very large sum of surcharge, and 2.2 times as much when we include it. The criminal prosecution has been more frequently invoked. There have been 4 cases from 1990FY to 1995FY, compared to no case in 1980s[23]. In addition, legal exemptions from the Antimonopoly law have been significantly streamlined. In particular, it was decided in March 1998, that the Antimonopoly law will be amended within three years to abolish exemptions for recession cartels and rationalization cartels.

(Table 2)

The following Table 3 shows the number of cartels as well as the amount of surcharges levied upon the members of the cartels by industry and by customers, which were subject to legal sanctions by the JFTC from 1989 to 1995. In terms of industrial sectors, manufacturing industry accounts

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synthetic fiber producers and European competitors in 1972, which agreed on the complete restraint of export to each other's market as well as on quantity ceiling and the minimum export price for the other markets, excluding that of the USA.

[22] The surcharge of 6% is levied for up to three years of the sales, with exceptions for the retail business (2%), wholesale business (1%) and small and medium firms (3% with a further exception of 1% for distribution business).

[23] The only major case which led to the criminal prosecution before 1990s was the cartel in oil refining industry in 1974.

for 31% of the cases and 60% of the surcharges. Construction industry accounts for 36% of the cases and 24% of the surcharges. Service and distribution sectors accounts for the rest. Government and other public bodies were the customers in more than half of the cartel cases. Bid rigging was the dominant form of cartels for public procurement contracts and construction industry were the main offenders in bid rigging[24]. In the case of private customers price cartel was the dominant form of cartels. Cartels in manufacturing sector accounted for about a half of the cartels for private customers.

(Table 3)

(2)Regulation of mergers and acquisitions

The JFTC has been relatively restrictive against mergers and acquisitions. 25% of the domestic market share has been regarded as a critical line with regard to the necessity of close scrutiny of competitive conditions. According to the Merger Guidelines of 1980 by the JFTC a close scrutiny is conducted of the proposed merger, if the market share of the merged firm exceeds 25% of the domestic market, among others. The market definition by the JFTC has been either national or regional within Japan. Although it does consider import in the evaluation of competition, there has been no case where the JFTC has used the global market as the defined scope of the market. It has not approved the efficiency defense for a merger either.

The following table 4 shows the domestic market shares of merged firms for the largest merger cases, the details for which was described by the JFTC annual reports from 1985 to 1995. In most mergers the market share

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[24] We can point out three causes for why bid rigging has been prevalent in the Japanese public procurements. First, the government organizations are much less concerned with cost minimization. They are more concerned with the smooth implementation of the budgeted projects. Second, the defection from cartel is much easy to detect in the case of government contracts, since the government is obliged to disclose publicly who is the winner of the bid. As the theory of cartel stability suggests, high detection rate of defection helps to maintain cartel. Thirdly, until the recent decision for open tendering, tenders has been invited only from nominated bidders.

of the post-merger firm did not exceed substantially the 25% market share line. There are three cases for which mergers achieving more than 30% market share were approved. However, they were more exceptions. In one case the declining market demand and low entry cost are judged to justify the merger. In another case the joint venture by the leading Japanese beer maker with a foreign large beer maker was approved for the reason of the regulatory restrictions upon expansion of liquor shops in Japan and only for 10 years.

In addition, when the market share of the post-merger firm is expected to exceed this line substantially, the JFTC often requested the firms to take measures which would limit their market power, as a precondition for the approval. For an example in 1995, JFTC asked one chemical company undertaking consolidation to divest its share-holding in the joint production company. It requested another chemical company undertaking consolidation to liquidate the joint-sales agreement with a foreign potentially competing company.

(Table 4)

3 Vertical restraints

(1) Overall regulation

Vertical restraints have been regulated in Japan mainly under the section of unfair trade practices of the antimonopoly law, since it covers wider business practices than the attempts of monopolization. Unfair trade practices can cover such business practices as resale price maintenance, joint refusal to deal, below cost sales and price discrimination, exclusive dealing, and territorial restriction. Similar to the policy practices in the USA or in the EU, such conducts as exclusive dealing are not per se illegal. Legality in Japan depends upon how the party requiring such contract is "influential" as well as upon how much such practice constrains the business practices of competitors. Major exceptions in this respect are resale price maintenance, joint refusal to deal and substantial below cost sales, which are illegal in principle, irrespective of the market position of a firm engaging in such activities. Focusing upon distribution, the JFTC issued the detailed guidelines on distribution and business practices in 1991, which is the direct outcome of the SII talk.

The following Table 5 shows the recent JFTC actions according to the

types of unfair business practices. Resale price maintenance accounts for one third of the cases. Requirement or exclusionary contracts, such as exclusive dealing, accounts for another third. Sales restriction in international licensing can directly affect international trade. The JFTC acted upon two international licensing cases in 1995, where there were agreements between Japanese firms and a Taiwanese firm, which restricted the sales by a Taiwanese firm to sell the product to Japan, even after the expiration of the licensing contract period.

(Table 5)

(2) **Exclusive dealing**

Exclusive dealing between manufacturers and distributors in Japan have sometimes been regarded as "market access" barriers. One of the main issues in the recent automobile trade dispute is the "closed" distribution system in Japan. In Japan all nine automakers have developed their own distribution networks and most dealers are specialized in selling automobiles of a particular automaker. Consequently multiple-franchising dealers have been almost nonexistent, except for those arranged by Japanese automakers themselves[25]. Similarly, the central competition policy issue in the recent film dispute was the relationship between the largest Japanese film producer and it first tier of wholesalers. These seven distributors currently sell only the film of this maker[26].

Exclusive dealing contract, when required by an influential firm[27], is deemed to be an unfair business practice in Japan, when that makes it difficult for competitors to find alternative distribution channels. There is a case where the exclusive dealing contract required by a firm which

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[25] The situation has been similar in Europe, where most dealers have single franchise agreements with major automakers. In contrast, around 30% of dealers have multiple-franchise dealership in the USA in 1989, although single franchise dealers were dominant in the USA too until 1960s.

[26] On the other hand, the second tier of wholesalers who buy films from the first tier of wholesellers for the resalse to small retail shops are not specialized in handling a single brand (the annual report of JFTC (1996)).

[27] An influential firm as defined by JFTC is a firm with more than 10% of domestic market or a firm ranked within the top three in terms of market shares.

possessed the two thirds of the domestic market was judged by the JFTC to be an unfair business contract. As for the automobile industry, the JFTC guided the two largest Japanese automakers to abolish the clause requiring the exclusive dealing in distribution contracts in 1979. In 1991 all domestic automakers decided to abolish the prior consultation clause for distributors in dealing other makers' model, in response to the JFTC's guideline on distribution. Thus, producers who have relatively large market shares cannot bind distributors by contracts for not dealing with competitors in Japan[28].

From an international perspective, it has not been the case that Japanese competition policy has been more favorable to exclusive dealing requirement by producers. In the USA efficiency improving nature of exclusive dealing is recognized so that such practice is likely to be treated as illegal only if it is exercised by a firm with significant market power[29]. There have been block exemptions authorizing explicit exclusive dealing in automobile sales in Europe.

(2)Parallel imports

In the application of the Japanese competition policy, not only resale price maintenance but also non-price vertical restraints, which have direct effects to reduce price competition among distributors, have been deemed to be illegal, without regard to the market position of the firm. Consequently such conduct by sole import agents as asking the foreign supplier to take measures closing the supply channel to parallel importers has been deemed to be a violation of the Anti-monopoly law. In recent years the JFTC took up several cases in this field, involving imports of tableware, piano, and bag.

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[28] Use of financial means with a exclusinary effect such as highly progressive rebates is also being restricted in Japan.

[29] In addition, market definition in the USA is often broader than that in Japan. In the US it was recently judged by the two US courts that the largest film producer in the USA does not have market power despite its dominant market share in the US market, since the market was judged to be global. Consequently, the two consent decrees issued by the USFTC, which had restricted the distribution practice such as selling private-label film and requiring exclusive dealing, were lifted.

III Implications for International Cooperation in Competition Policy

1 Welfare measure

In considering international cooperation for competition policy, the critical issue is what welfare measure is to be used in evaluating private anticompetitive practices. The appropriate measure is global welfare and global output as its surrogate. A particular business behavior is anticompetitive domestically if it reduces domestic supply of industry. Similarly, a particular business behavior is anticompetitive internationally if it reduces global supply of that industry.

Why global welfare criterion should be used in stead of national welfare criterion? National welfare implies adoption of different standards of competition policy with regard to anticompetitive behaviors in home market vs. those in international markets or with regard to the behaviors of foreign firms vs. those of home firms. One example of such policy is prohibiting cartel in domestic market while allowing it in export market. Another example is to regard whatever business practices in foreign markets as anticompetitive, if the export of home firms are constrained.

Such discriminatory application of competition policy has two major problems. First, it may undermine domestic standards. The historical evolution of competition policy principle from protecting competitors to protecting competition can be negatively affected. Second, when a foreign country adopts a similar policy, the national welfare of both countries can decline, just as the optimal tariff policy is in fact not optimal, given the similar foreign behavior. The use of competition policy as rent-shifting policy is self-destructive in theses sense.

The guiding principle for securing consistency with global efficiency is to establish the national treatment in the application of competition policy for domestic and foreign firms as well as for domestic and foreign consumers. Currently national competition policy does not necessarily respect this principle and there is a danger that the political pressure for using antitrust policy for expanding "market access" can further widen the gap[30]. There exist several important implications of national treatment:

[30] The US government is authorized by the Congress to apply its antitrust law in

(1) the extension of home competition policy to export cartel,

(2) the prohibition of import cartel. An exception, however, may be granted to the case where import cartel is formed as a countervailing device against export cartel.

(3) the application of the same competition policy standard to the foreign and domestic firms. In the case of extra-territorial application of competition policy the same standards will be used for a foreign firm as for a home firm.

Once national treatment is established and substantive standards on competition policy are agreed internationally, each economy will become willing to delegate the enforcement of competition policy to the country which can most efficiently investigate and enforce corrective actions, which would be typically the country where firms are located. It will thus encourage the development of division of labor in enforcing competition policy, avoiding the duplication and inconsistency in enforcing competition policy.

2 Priorities for international cooperation

High priority for international cooperation in competition policy could be given to the regulation of private anticompetitive conducts which have negative as well as large international impact. As discussed in section II, trade cartels, including international cartels, do have negative international spillover. Its degree depends upon the international market power of the cartel. The same thing applies to merger with international market power. In contrast, domestic cartels per se do not have a substantially negative international spillover.

As for vertical practices, what should be addressed is efficiency-reducing vertical practices. The degree of spillover depends upon whether the market foreclosed by a firm is large in the international market. In

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an extra-territorial manner to foreign business practices which hinder the export expansion of the US firms (Foreign Trade Antitrust Improvement Act of 1982). It has not yet been clarified whether in applying this provision the US government has to meet the same antitrust standard as those for domestic firms or it can use separate standards just for the purpose of export expansion.

both horizontal practices and vertical restraints it is clear that a larger economy has more responsibility for controlling the anticompetitive behavior of its firms and for keeping its market competitive. Firms located in a relatively small country are less likely to have an international market power. Moreover, vertical restraints in a small country will not affect materially international trade. Thus, international agreement for cooperation in competition policy may be framed so that a differential treatment can be provided to small developing countries.

IV Conclusions

Competition policy, including its absence, can have an important international spillover. However, the recent focus upon competition policy from "market access" concern is misleading. The anticompetitive behavior which can have the most clearly negative international spillover is export cartel. Export cartel, however, does not constrain "market access". Moreover, export cartel or similar export restraining arrangements were often used in the past to ameliorate trade frictions. Pure domestic cartel tends to improve "market access" and tends to have a positive international spillover, although we have to take into account its downstream and upstream effects too in assessing the net international effect. Although vertical restraints can constrain "market access" and can have a negative international spillover, we have to distinguish efficiency-reducing vertical restraints from efficiency-improving restraints.

The Japanese government has substantially strengthened its competition policy in 1990s, especially in the drastic reduction of cartels exempted from the application of Antimonopoly Law, including trade cartels, and in its enforcement against cartels. On the other hand, the Japanese competition policy has been fairly restrictive toward mergers and acquisitions, and regulations toward vertical restrains have not been significantly weaker than those in the USA. The recent change toward stronger enforcement of competition policy, especially, against cartels would be highly beneficial to the Japanese economy. But, on the other hand, it is not clear whether such policy change can have a substantial impact on "market access".

In promoting international cooperation in competition policy, it would be important to have national treatment as the guiding principle, in order

to avoid the danger of using competition policy for rent-shifting policy. Priority in international cooperation could be given to the control of anticompetitive behaviors of firms with international market power.

Although this paper has focused upon competition policy in a narrow sense, it is very important to recognize that there exist many remaining GATT issues the resolution of which will contribute to the development of competitive market perhaps much more than cooperation in competition policy itself. Unrestricted international trade will make market more competitive, so that sustaining cartel and the other anticompetitive behaviors will become more difficult. A major issue in this regard is the reform of antidumping rule. Although antidumping measures have been sometimes defended by its proponents as a substitute for the competition policy abroad or as a transitory measure while markets remain non-integrated, both the guiding principles as well as the actual practices of antidumping measures are so widely divergent from those for competition policy interventions. The second area is the reform of government procurement agreement. It has currently only a limited membership. Furthermore the experiences of many signatory countries, including that of Japan, suggest that public procurement is vulnerable to bid-rigging. Thus, there is a substantial efficiency gain from more competition in this area.

Reference

Bliss C. 1996, "Trade and Competition Control", in *Fair Trade and Harmonization Prerequisites for Free Trade ?*, edited by J. Bhagwati and R. Hudec, MIT Press

European Commission (Report by the group of experts), 1995, "Competition Policy in the New Trade Order: Strengthening International Cooperation and Rules," European Commission DGIV

Fair Trade Commission of Japan, 1991, *Current Status and Directions for Improvement in the Exemption System from the Application of Antimonopoly Law,* Government Printing Office

Hausman J. A. and J. K. Mackie-Mason, 1988, "Price discrimination and patent policy," Rand Journal of Economics, Vo.19, No.2

International Trade Commission of the USA, 1995, *The Economic Effects of Antidumping and Countervailing Duty Orders and Suspension Agreements,* Washington, D.C.

Katz, M. L., 1989, "Vertical contractual relations," in Handbook of Industrial Organization edited by R. Schmalensee and R. D. Willig, North-Holland: Amsterdam

Krugman P., 1984, "Import protection as export promotion," in H. Kierzkowski, ed., *Monopolistic Competition and International Trade.* Oxford, Blackwell

Levinsohn James , 1996, "Competition Policy and International Trade", in *Fair Trade and Harmonization Prerequisites for Free Trade ?*, edited by J. Bhagwati and R. Hudec, MIT Press

Nagaoka S.,1995, "Antidumping Policy and Competition," in *Regulatory Policies and Reform in Industrializing Countries* edited by C. R. Frischtak, World Bank

Ordover J. A. and G. Saloner, 1989, "Predation, Monopolization, and Antitrust," in *Handbook of Industrial Organization* edited by R. Schmalensee and R. D. Willig, North-Holland: Amsterdam

Ordover J. A., G. Saloner and S. Salop, 1990, "Equilibrium vertical foreclosure," American Economic Review, vol.80, no.1, pp127-142.

Salant, S., W. Switzer, and Reynolds, R. J., 1983, "Losses from Horizontal Merger: The Effects of and Exogenous Change in Industry Structure on Cournot-Nash Equilibrium," Quarterly Journal of Economics, Vol.97, pp185-199

Scherer, F. M. ,1994, *Competition Policies for an Integrated World Economy,* Brookings Institute

Tirole J., 1990, "Competition-reducing vertical restraints," in *Industrial Structure in the New industrial Economics* edited by G. Bonanno and D. Brandolini, Clarendon Press: Oxford.

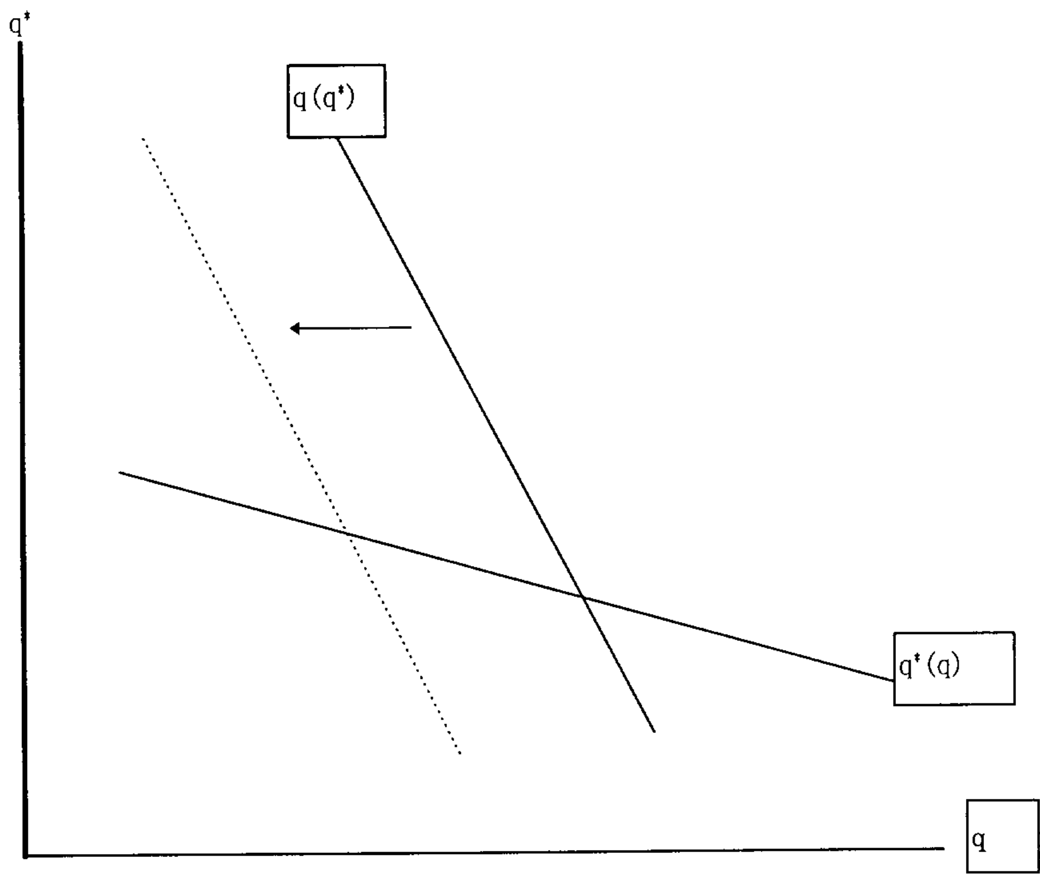

Figure 1 Economic Effects of Cartel

Figure 2 Number of Cartels Exempted from the Application of Antimonopoly Law

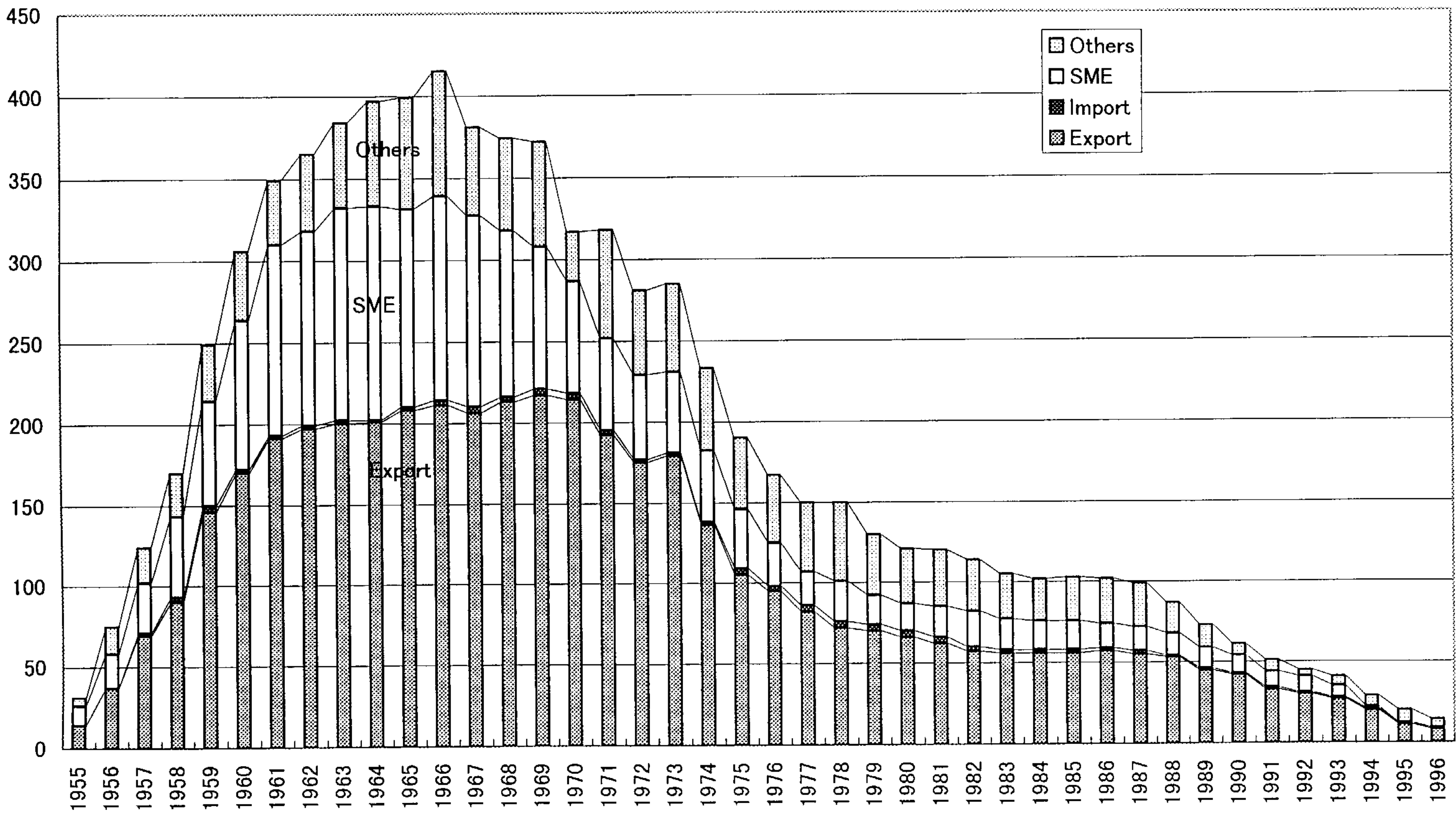

Table 1 No. of Cartels Exempted from the Application of Antimonopoly Law in Japan

Types of exempted cartels	Subcategory	April 1st 1991	March 1st 1997
International Trade	Export	30	4
	Import	1	1
	Association of Small traders	3	0
Recession or rationalization cartels		0	0
Small and medium enterprises		10	0
Fishery		4	4
Transportation	Coastal shipping	1	1
Barbershop and other service		1	1
Total		50	11

Note. Regional cartels in the same product are counted only once.

(source) Made from JFTC Annual reports

Table 2 Antimonopoly enforcement against cartels in 1990s

	90FY	91FY	92FY	93FY	94FY	95FY	96FY	90-96FY
No. of cartels acted upon	13	19	30	24	21	24	15	146
Total surcharge(billion Yen)	12.6	2.0	2.7	3.6	5.7	6.4	7.4	40.4
Criminal prosecution	0	1	1	0	1	1	1	5

Note 1. In addition to the legal measures for injunction and for levying surcharge, the JFTC issues warning and guidance for those cases where enough evidence cannot be found for establishing the violation of the Antimonopoly Law. In 1995 FY alone JFTC issued 5 warning and 16 guidance with respect to suspected cartels (12 against price cartels and 12 against bid-rigging).

Table 3 Japanese cartels by Industry, Type and Purchaser from 1989FY to 1995FY

Industry	Public procurement (No. of cases)			Private procurement (No. of cases)					
	Bid rigging	Price cartel	Others	Bid rigging	Price cartel	Others		%	Surcharge in B Yen(%)
Manufacturing	14	2	0	1	25	0	42	31	19.7(60)
Distribution	4	0	0	0	9	1	14	10	2.5(8)
Construction	48	1	1	0	0	0	50	36	8.0(24)
Service and others	11	1	0	0	14	5	31	23	2.5(8)
Total	77	4	1	1	48	6	137	100	32.7(100)

Note. The number of cases for which surcharges were levied up to the end of 1995FY are 37 for manufacturing, 10 for distribution 37 for construction and 23 for service and other industry.

(Source) Made from Annual Reports of JFTC

Table 4 Market Shares of Major Horizontally Merged Firms from 1985 to 1995

Market shares	No of cases
less than or equal to 20%	11
Less than or equal to 25%	6
Less than or equal to 30%	3
More than 30%	3
Unknown	2
Total	25

Note. This table covers only major horizontal case having the national market as its market as reported in the JFTC annual reports. When JFTC examine several layers of markets, this table adopts the broadest market.

(Source) made from JFTC annual reports

Table 5 Unfair Business Practices subject to JFTC Actions in 1990s

Types of unfair business practices	No. of Cases (1991 to 1995)
Resale price maintenance	20
Requirement or exclusionary contracts	24
Business interference	5
Abuse of a stronger bargaining position	2
Other	7
Total	58

Note. Actions include warning, where violations were suspected but enough evidence for that were not obtained. The above numbers do not include the unfair practices conducted by business associations, which were subject to the JFTC actions.

(Source) Made from Annual Reports of JFTC